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COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 19 OF THE CONVENTION

Initial reports of States parties due in 1991

Addendum

GERMANY

[9 March 1992]

I. GENERAL REMARKS

1. The Government of the Federal Republic of Germany signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 13 October 1986; its instrument of ratification was deposited on 1 October 1990. In accordance with article 27 (2), the Convention entered into force for the territory of the Federal Republic of Germany on 1 November 1990.

2. The German Democratic Republic, in respect of which the Convention had entered into force on 9 October 1987, acceded to the Federal Republic of Germany on 3 October 1990. The report therefore also covers the five new Länder: Mecklenburg-Western Pomerania, Brandenburg, Thuringia, Saxony and Saxony-Anhalt.

3. The year 1991, in which the German Government is submitting its first national report in accordance with article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is also the year in which we are commemorating a pioneering opponent of torture born four hundred years ago, namely the Jesuit father Friedrich von Spee (1591-1635). This concurrence of dates provides us with a good opportunity to take a look at the history of torture in German law.

4. In old German law, for example in the law of the Germanic tribes and in the law of the "Holy Roman Empire of the German Nation" of the early Middle Ages, torture as a means of obtaining confessions was unknown. The adoption of the Roman law of late classical antiquity which commenced during the high Middle Ages meant that the Roman trial by inquisition, which was pursued on behalf of the public authorities and in which the confession required to convict the accused could among other things be obtained through the use of torture, was adopted into German law. At that time, the use of torture was subject to certain judicial circumstances. For instance, it could not be used until the torture instruments had been shown to the offender. The testimony the accused gave while being tortured was recorded; the course of the proceedings and the sequence of torture instruments to be used were regulated by law. The rules of court (Peinliche Gerichtsordnung) issued by Emperor Charles V in 1532 endeavoured to halt the abuses which had arisen in the application of these regulations. However, they did not succeed. On the contrary, torture played a terrible and calamitous role during the sixteenth and seventeenth centuries in Germany. It was a period dominated by religious fanaticism. The widespread heresy trials ("witch trials"), testimonies and "confessions" concerning alleged accomplices extorted while the accused was being tortured resulted in many more trials.

5. As the confessor of many innocent women accused and convicted of being a "witch", Friedrich von Spee gained a profound insight into the inhumanity of criminal proceedings involving torture. In his work Cautio criminalis, which appeared anonymously in 1635, he was one of the first to denounce the cruel abuses of the judicial system of his time and to call for the abolition of torture. Many famous people later supported his demand (e.g. Thomasius, Voltaire, Beccaria, Mösern). King Frederick II of Prussia became the first ruler largely to abolish torture in his country shortly after his accession to the throne in 1740. Torture was completely abolished in Prussia in 1754, and all German and European States followed this example.

6. Torture as defined by legal history was never reintroduced into Germany law. However, there were countless acts of torture under the Hitler regime (1933-1945), mainly committed on prisoners of the Gestapo and those in concentration camps.

7. It is particularly in view of these painful experiences that in the very first provisions of its constitution, the Basic Law, the Federal Republic of Germany declares its commitment to uphold human rights, guarantees the inviolability of the dignity of man and also obliges "all state authority" to respect and protect it.

8. Torture, one of the most serious attacks imaginable on the dignity of man, is thus proscribed by the constitution in Germany. In accordance with the rulings of the Federal Constitutional Court, the principle that the dignity of man be respected also means that cruel, inhuman and degrading punishments are prohibited (Federal Constitutional Court 45, 187, 228). Moreover, for persons in official custody, this protection is clarified and put in concrete terms once again, in the second sentence of article 104 (1) of the Basic Law. This provision prescribes that detained persons may not be subjected to mental or to physical ill-treatment.

9. The significance of the prohibition against torture couched in the form of the guarantee of the dignity of man becomes clear when article 1 (3) of the Basic Law, which provides that the basic rights guaranteed there bind "the legislature, the executive and the judiciary" as directly enforceeable law, is considered.

10. This is also of importance for the validity of the prohibition against torture in a federal State such as Germany which, since the accession of the former German Democratic Republic as of 3 October 1990, encompasses a total of 16 Länder, the "old" Länder Baden-Württemberg, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North-Rhine/Westphalia, Rhineland-Palatinate, Schleswig-Holstein and the Saarland, as well as the aforementioned five "new" Länder. Since the fall of the Berlin Wall, which separated West Berlin from the eastern part of the city, the Land Berlin has again constituted a political entity.

11. In the Federal Republic of Germany, legislative and administrative competences are divided between the Federation and the Länder as specified in the Constitution. This has the effect, for example, that the legal provisions important for the implementation of the prohibition against torture are partly covered by federal laws and partly by Länder laws. Alongside the Länder laws governing the police there are also provisions in federal law. That is due to the fact that although the Länder are primarily responsible for the organization of the police (there is, for example, a North-Rhine/Westphalian police force, a Bavarian police force, etc.), there are also police forces at federal level such as the "Federal Border Guard". Accordingly, there are federal officials as well as Land officials in the police service. The legal status of these officials is either regulated by the public service law of the Länder or by that of the Federation. The prohibition against torture guaranteed by the protection of the dignity of man as enshrined high up in the catalogue of basic rights, applies to both federal and Land legislation - as do all basic rights ensured by the federal Constitution. The same standard must be applied without differentiation to federal and Land laws in this respect. The prohibition against torture takes precedence and is directly enforceable law which, by force of the federal Constitution, is to be respected by all forms of German legislation and takes precedence over every German law, whether it be a federal law, Land law or a local by-law.

12. In connection with the prohibition against torture, the guarantee of recourse to the courts also laid down in article 19 (4) of the Basic Law is fundamental. It states that "Should any person's rights be violated by public authority, recourse to the court shall be open to him". The guarantee of recourse to the courts contained in the Constitution is an important, although not the only, instrument which ensures that basic rights, and thus the prohibition against torture, are observed. The prohibition against torture is also guaranteed by the provisions of other laws. That applies to acts of torture being punishable, which will be examined more closely later. It also applies to provisions such as that contained in paragraph 136a of the German Code of Criminal Procedure (see paras. 28-35).

13. The Federal Republic of Germany is a functioning constitutional State, the effectiveness of which is based on many factors, inter alia, the possibility of mobilizing the general public. Should atrocities ever occur in Germany of the kind offered as examples in the Kooijmans report (United Nations document E/CN.4/1986/15) of torture practices still being used, the media (press, radio and television), whose independence from the State is given special protection by the Basic Law, would not hesitate to denounce this scandal publicly. It is also likely that the freely elected representatives of the German people, particularly the German Bundestag or the parliament of the Land in which the incidents occurred, would establish an investigating committee to elucidate the incidents so that political and legal action could be taken.

14. Of course, not every case covered by the Convention is so spectacular that it could trigger such reactions. That is why the guarantee of recourse to the courts is the most important and most effective control of the State, as it provides everyone with an opportunity to make use of the assistance of the courts in every actual or merely supposed case of violation of the prohibition against torture. Germany has an extensive and diverse system of legal recourse and appeal. Depending on the nature of the subject-matter of the action, they either lead to the courts of ordinary, labour, administrative, social or fiscal jurisdiction. Around 1,000 courts, over 19,000 judges, almost 4,500 public prosecutors and more than 60,000 lawyers help to ensure that the constitutional State works in Germany. Persons who, as a result of their personal and financial circumstances, cannot pay the costs of legal proceedings or can only pay a part or in instalments, receive legal aid if the prosecution has sufficient prospects of success.

15. The way in which someone claiming to be a victim of torture prohibited under the Convention could ask for help from the courts depends on the circumstances in each individual case and on the predominant interests of the injured party. As a prisoner on remand or serving a sentence, he could file one of the remedies in the Criminal Procedure Code or the Execution of Sentences Act (Strafvollzugsgesetz) which are open to prisoners claiming that their rights have been violated. The more precise comments on article 12 are referred to in this connection. This method could be the best way to establish that the maltreatment inflicted on the complainant was illegal. Instead of that, the injured party or his lawyer could consider bringing a legal action for a liability in office charge in the civil courts in order to obtain compensation. However, the most obvious and simplest course of action in such cases is, as a rule, that the person concerned institutes proceedings against the officials responsible by reporting the maltreatment he suffered to the police or the department of public prosecution as assault and battery in office, thus initiating a preliminary criminal investigation against the accused which is free of charge to the injured party.

16. If the remedies referred to above do not lead to success, the person concerned has the additional possibility, even if the matter has been concluded finally and against him, of directing an appeal to the Federal Constitutional Court within a certain period of time. It exercises a form of control which is tailor-made for violations of basic rights. If the Federal

Constitutional Court establishes that such a violation has occurred, it repeals prior decisions which incriminated the complainant despite the legal force of such decisions. Finally, the person concerned can also submit a petition to the Petitions Committee of the Bundestag or of the relevant Landtag. It then asks the competent minister to inform it of the case and, if necessary, submits recommendations on appropriate measures.

17. In its Constitution, Germany acknowledges that human rights are the basis of every community. Although the implementation of human rights is primarily the task of individual nations, there is no doubt that, as a result of their universal claim to validity, human rights also have a bearing on the international legal community. It is for this reason that the Federal Republic of Germany became a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) as early as 1952 and submitted to the competence of the European Commission of Human Rights to receive and examine individual complaints (European Convention on Human Rights, art. 25) as well as to the jurisdiction of the European Court of Human Rights (European Convention on Human Rights, art. 46) from the outset.

18. The observance of the prohibition against torture is, therefore, also subject to a form of international control which is probably the most effective in international law at present. Under article 3 of the European Convention on Human Rights, no one may be subjected to torture or to inhuman or degrading treatment or punishment. Any person claiming to be a victim of a violation by the German authorities or a German public official of the right set forth in article 3 of the Convention can, after all domestic remedies have been exhausted, submit a complaint against Germany to the Commission in accordance with article 25 of the Convention

19. The European Court of Human Rights has since then established violations of the Convention by contracting parties in numerous judgements, granted the victims compensation and has often forced the contracting parties through its judgements to bring domestic laws into line with the Court's interpretation of the Convention in order to avoid renewed violations of the Convention.

20. Against this background, the German Government can state with satisfaction that the controlling bodies set up by the European Convention on Human Rights have not once established a violation of article 3 of the Convention by the Federal Republic of Germany during the 36 years that it has submitted to the procedure set forth in article 25 of the Convention. The German Government believes that this confirms its estimation that the observance of the prohibition against torture does not raise any problems in Germany.

21. The German Government is, however, aware that the effectiveness of the prohibition against torture contained in the European Convention on Human Rights can be increased further through appropriate complementary measures of international control. That is why Germany also ratified the European Convention for the Prevention of Torture and inhuman or Degrading Treatment or Punishment and thus submitted to the system of international inspections

provided for in this Convention to guarantee the humane treatment of persons who have been detained and taken into custody by the authorities. The provision to submit a report prescribed in article 40 of the International Covenant on Civil and Political Rights in connection with the prohibition against torture and inhuman treatment and punishment embodied in the Convention (art. 7 of the Civil Rights Covenant) must be mentioned here.

22. The main problem for the German legal system raised by the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment lies in the main terms used in the Convention itself, namely the incorporation of the terms "torture" and "other cruel, inhuman or degrading treatment or punishment" into our national legal system. This applies in particular to criminal law. According to article 4, the State parties must ensure that "all acts of torture" are offences whereas according to article 16 (1) of the Convention, other acts which constitute cruel, inhuman or degrading treatment or punishment must be prevented but not made punishable. In the German view, however, criminal law must be based on elements of an offence which are as clearly defined as possible.

23. Germany, as a contracting party to this Convention, has therefore refrained from including provisions in its national legislation which make general statements on "torture" or "other cruel, inhuman or degrading treatment or punishment" which depend on these vague legal terms being given substance. Germany prefers to comply with its contractual obligations through a series of concrete penal provisions. German criminal law makes assault and battery in office and extraction of testimony by duress (sections 340, 343) punishable regardless of whether in individual cases the assault and battery in office or extraction of testimony by duress constitutes "torture" or "other cruel, inhuman or degrading treatment or punishment" or an act which does not fall under any of these terms. The threat of punishment, regardless of whether one of the terms contained in the Convention applies, goes beyond the obligations of the Convention. On the other hand, the penal provisions regarding assault and battery in office and extraction of testimony by duress (sections 340 and 343 of the Penal Code) ensure that the matters dealt with by the Convention are covered by criminal law. The task of effectively combating acts of torture can be accomplished more reliably through penal provisions such as sections 340 and 343 of the Penal Code than those which make "torture" in general punishable. Besides, section 340 (2) of the Penal Code provides for stiffer penalties for grievous bodily harm than those which normally apply to assault and battery in office. Section 340 (2) of the Penal Code refers to the statutory definition of grievous bodily harm contained in section 224 of the Code which provides a precise description of the kind of injuries the victim must have suffered to justify the conviction of the offender for "grievous" bodily harm in office: the bodily harm committed on the injured party must result in the loss of "an important part of his body, sight in one or both eyes, hearing, speech or his procreative capacity, or in a serious permanent deformity, or deteriorate into invalidity, paralysis or mental illness".

24. The statement that "torture" and "other cruel, inhuman or degrading treatment or punishment" are terms not used in German law must be qualified. Article 3 of the European Convention on Human Rights is deemed a directly

enforceable provision in German domestic law and has the same force as federal law enacted by the German legislative. For the legal authorities in Germany assume that once an international treaty has been ratified by the legislature, it becomes German national law when it enters into force for Germany. In this way, the ban on torture and inhuman or degrading treatment or punishment embodied in article 3 of the European Convention on Human Rights has become an integral part of our domestic legal system.

25. This process is, however, subject to some restrictions. It only applies to those international provisions which are formulated in the manner of a domestic provision as a personal right. In contrast, provisions which clearly only regulate the rights and obligations of the contracting States do not automatically become German domestic law. It is, therefore, doubtful and disputed whether the ban on torture embodied in article 7 of the International Covenant on Civil and Political Rights became German law in view of article 2 (1) of that Covenant which provides for a general State obligation to respect the rights guaranteed in the Covenant. The present Convention, at any rate, establishes, in the opinion of the German Government, exclusively State obligations. Whether this also applies to article 3 of the Convention was, however, questioned during the internal debate prior to ratification. In order to clarify this point, the German Government submitted the following explicatory declaration on depositing its instrument of ratification:

> "This provision regulates the prohibition against surrendering a person to another State where he would be in actual danger of being subjected to torture. In the view of the Government of the Federal Republic of Germany, article 3 and the other provisions of the Convention exclusively establish State obligations that the Federal Republic of Germany fulfils in accordance with its domestic law, which conforms with the Convention."

26. Accordingly, courts and administrative authorities do not apply the Convention, but rather German law which conforms to it. The Convention must also be taken into consideration when interpreting domestic law (a consequence in particular of the German legal system's respect for international law which also finds expression in the Basic Law (arts. 24-26 of the Basic Law)). This procedure is in line with international law because international treaties such as the present Convention only bind the contracting States with regard to the objective of the Convention but leave them a free hand in the question of which means are to be used to attain this objective.

27. A direct application of the Convention is, in an exceptional case, prescribed by special German legal provisions. Section 6, item 9 of the German Penal Code stipulates that regardless of the law of the place of commission, German criminal law is applicable to criminal offences committed abroad including "acts committed abroad which are made punishable by the terms of an international treaty binding on the Federal Republic of Germany". On examining section 6, item 9 of the Penal Code, the German judge must consider, on the basis of the provisions of the Convention, whether German criminal law applies to an act of torture committed abroad.

II. SPECIFIC REMARKS

Re. article 2

28. As has already been indicated in the general section, the domestic implementation of the principle described in article 2 (1) is fully guaranteed in Germany. Protection against torture is principally guaranteed by the provisions of the Constitution, namely articles 1 (1), 2 (2) and the second sentence of article 104 (1) of the Basic Law. Article 1 (1) of the Basic Law states: "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all State authority."

29. The obligation to protect the inviolable dignity of man is subject to no restrictions under German law. The prohibition against torture must, therefore, be strictly observed even in the exceptional circumstances referred to in article 2 (2) of the Convention. Article 2 (2) of the Basic Law states as follows: "Everyone shall have the right to life and to physical integrity."

30. The right to protection from the State guaranteed in the first sentence of article 2 (2) of the Basic Law is not only directed at interference by the State in physical integrity but also encompasses encroachments through psychological or mental torture and the corresponding interrogation methods (Federal Constitutional Court 56, 54, 75).

31. The second sentence of article 104 (1) of the Basic Law stipulates: "Detained persons may not be subjected to mental or to physical ill-treatment."

32. A series of provisions contained in the Penal Code also guarantee protection from torture and other cruel, inhuman or degrading treatment or punishment, in particular the provisions concerning assault and battery in office (section 340) and extraction of testimony by duress (section 343). They state:

Section 340

"(1) A public official who commits, or permits to be committed, bodily harm during the exercise of his duties or in connection herewith, shall be punished by imprisonment from three months to five years. In less serious cases up to three years' imprisonment or a fine shall be imposed.

(2) If serious bodily harm (section 224) is committed, not less than two years' imprisonment shall be imposed and, in less serious cases, imprisonment from three months to five years."

Section 343

"(1) Whoever, in his capacity as public official, whose duties involve acting in:

1. a criminal proceeding, or a proceeding to order authorized custody;

2. an administrative fine proceeding; or

3. a disciplinary proceeding or an honour court or professional court proceeding.

physically abuses another, or makes use of violence against him, or threatens him with violence, or mentally torments him, in order to coerce him to give testimony, or not to do so, in the proceeding, shall be punished by imprisonment from one to ten years.

(2) Imprisonment from six months to five years shall be imposed in less serious cases."

33. Section 136a of the Code of Criminal Procedure also makes an important contribution towards prohibiting torture. It states:

"(1) The freedom of the accused to determine and to exercise his will shall not be impaired by ill-treatment, by fatigue, by physical interference, by dispensing medicines, by torture, by deception or by hypnosis. Force may only be applied so far as is permitted by the law of criminal procedure. Threatening with a measure not permitted by the provisions of such law and promising an advantage not provided by law are prohibited.

(2) Measures which impair the accused person's ability to remember or to comprehend are not permitted.

(3) The prohibitions of sub-sections 1 and 2 apply irrespective of the accused person's consent. Statements which were obtained in violation of these prohibitions may not be used even if the accused agrees to said use."

34. Sections 340 and 343 of the Penal Code and section 136a of the Code of Criminal Procedure will be looked at more closely within the context of articles 4 and 11.

35. The provisions in the Public Service Law Skeleton Act (Beamtenrechtsrahmengesetz) (section 38 (2), clause 2) and the Military Personnel Act (Soldatengesetz) (section 11 (2)) meet the requirements of article 2 (3) of the Convention. They provide that orders from a civilian or military superior are not binding if the action which the public official or soldier is instructed to take constitutes a punishable offence. The provisions are included in the annex 1/ (Nos. 1 and 2).

Re. article 3

36. Under section 53 (1) of the new Aliens Act (Gesetz zur Neuregelung des Ausländerrechts) of 9 July 1990 (Federal Law Gazette 1 1354), no alien can be deported to a State where there is a real danger of his being subjected to torture. With this provision (the wording is included in the annex 1/ under No. 3), the Federal Republic of Germany has incorporated the obligation under

international law to observe article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment into its national law.

37. The decisions made by the Federal Administrative Court, the court of last resort in administrative jurisdiction, acknowledged even before that it would be incompatible with the principle of the dignity of man, the most important principle of the German legal system, for the German authorities to be instrumental in treatment of a victim which constituted a violation of human rights by surrendering him to a State where he was in danger of being tortured (cf. e.g. Federal Administrative Court 67, 184, 194). This aspect had to be taken into consideration when making decisions regarding the expulsion and deportation of aliens.

38. Where an alien claims that he would be in danger of being subjected to torture should he return to his native country, the competent authorities must investigate whether the legal impediment rendering deportation inadmissible, defined by section 53 (1) of the Aliens Act, applies. The nature and extent of the investigation depend on the pleading made by the alien and and other concrete grounds for assuming that the impediment applies. In those cases where asylum proceedings are taking place, the alien's pleading will have already been investigated by the Federal Agency for the Recognition of Foreign Refugees.

39. Provided that the claim concerning the risk of torture can be adequately substantiated, the alien cannot be deported to the State where he is exposed to this risk.

40. There is no information available on a number of cases until now where the authorities refrained from deporting an alien under section 53 (1) of the Aliens Act because the alien's claim that he was in danger of being subjected to torture was credible.

41. As the risk of torture presupposes that the alien will be persecuted, this claim is generally regarded as an application for asylum. As a rule, any risk of torture should, therefore, be adequately cleared up during the asylum proceedings. It is not possible to determine in how many cases the Federal Agency for the Recognition of Foreign Refugees took the risk of torture into consideration when reaching its decision.

Extradition

42. Where there is no extradition treaty, section 73 of the Law on International Assistance in Criminal Matters (Gesetz über den Internationalen Rechtshilfeverkehr) applies, under which extradition and any form of legal assistance is prohibited if the person concerned would be subjected to violations of human rights, especially torture, if he were to be extradited. This prohibition is also taken into consideration where there is an extradition treaty, regardless of whether a corresponding prohibitory or reservation clause is included in the applicable instrument of international law. The Federal Republic of Germany only concludes extradition treaties which establish an obligation to extradite in certain cases with States which appear to respect human rights.

43. Nevertheless, a clash between an official obligation to extradite and concern about violations of human rights cannot be completely ruled out. As yet, the Federal Government has not once, not even in its relations with a problematic country, based its refusal to extradite expressly on the grounds that the person concerned was in danger of being subjected to torture or other violations of human rights if he were to be extradited to the requesting State. This is because in all cases where this apprehension could not be dispelled, the refusal to extradite could be based on other grounds, mostly the risk of prosecution contrary to human rights (article 3 (2) of the European Convention on Extradition).

44. In the sphere of extradition too, court decisions in the Federal Republic of Germany have emphasized the importance of protecting the person concerned from violations of human rights in the State requesting his surrender. This was demonstrated above all by two decisions made by the Federal Constitutional Court in 1983 (Federal Constitutional Court 63, 197; 215). They concerned requests for extradition from a State where the persons concerned claimed that they were in danger of being persecuted on political grounds, inter alia, in the form of torture. The Federal Constitutional Court supported the view that in cases where the risk of torture cannot be completely ruled out, the assurance of the requesting State that the person concerned will only be prosecuted for the offences referred to in the request for extradition is not sufficient. Rather, a very close examination of each individual case was necessary. It had to be examined whether there was a risk of the person concerned being subjected to political persecution and, therefore, possibly torture in the requesting State which would represent a violation of the assurance given. Such an examination was particularly necessary when an official violation of the rule of "speciality of prosecution" in the requesting State was known. Furthermore, in cases where a person was extradited to serve a prison sentence, it should be examined whether and to what extent the person concerned was in danger of being subjected to hidden repressive measures in prison.

Re. article 4

45. Under German criminal law, there is no specific statutory definition of torture. It is not necessary as all modes of conduct which must be penalized in accordance with article 4 of the Convention are covered within the meaning of article 1 of the Convention by existing penal provisions. This was examined in more detail in paragraphs 22 and 23 above.

46. Section 340 of the Penal Code, which was referred to previously in connection with the observations on article 2 of the Convention, makes assault and battery in office punishable. Both an actual action and failure to act, for example by a public official who, contrary to his official duties, fails to take steps against bodily harm being committed by a third party, can correspond to the statutory definition.

47. Within the scope of section 340 of the Penal Code, a "public official" can also be an officer or a non-commissioned officer in a military unit (section 48 of the Military Penal Act (Wehrstrafgesetz)).

48. Section 340 of the Penal Code not only makes the "use of torture" punishable, but also provides comprehensive protection against maltreatment. Even mild forms of bodily harm, such as a punch or a box on the ears inflicted on the victim, fulfil the statutory definition.

49. Illegal interrogation methods used in criminal investigations or similar proceedings are punishable under section 343 of the Penal Code which was referred to in connection with article 2.

50. Moreover, in other cases of torture included in article 1 of the Convention, a penalty for coercion or threat (sections 240, 241 of the Penal Code) is, depending on the circumstances, possible. The wording of these regulations is included in the annex 1/ under No. 4.

51. The penalizing of complicity and participation in torture, prescribed in the second sentence of article 4 (1), is guaranteed by the general regulations on the criminality of perpetration and participation. In practice, "attempted" torture generally manifests itself in the form of a threat of maltreatment; such a threat is punishable in accordance with section 241 of the Penal Code which stipulates in paragraph 1 that

> "(1) Whoever threatens another with the commission of a felony against him or a person near and dear to him shall be punished by up to one year's imprisonment or by fine".

Attempted dangerous and attempted grievous bodily harm are also punishable under German law.

52. German criminal law complies with the requirement contained in article 4 (2) to make torture punishable "by appropriate penalties" which "take into account their grave nature" by way of the diverse graduated penalties prescribed by the penal provisions referred to. In addition, the more severe penalties for intentional grievous bodily harm and for bodily harm with fatal outcome should be noted.

53. The number of convictions for assault and battery in office is extremely low. The 1989 statistics on prosecution in Germany (within its territorial boundaries at that time) show that in the year concerned 27 persons were convicted by German courts for assault and battery in office and 2 persons for extraction of testimony by duress under sections 340 and 343 of the Penal Code. Although convictions will have been included in these figures for criminal offences which could possibly qualify as torture as defined in article 3 of the Convention, in practice these are not cases which correspond to the typical conception of "torture". Many of the few convictions concerned teachers who had exercised a right of chastisement on pupils not permitted by the courts, for example by giving them a "box on the ears".

54. In line with the principle of due course of law and article 6 (2) of the European Convention on Human Rights, a person accused of assault and battery in office is, as with other accusations, presumed innocent until proven guilty. It must be proven that the accused, just as every other person suspected of a crime, committed such an offence.

55. The effects of a final and conclusive conviction for assault and battery in office are so lasting that they help to prevent acts of torture being committed. In addition to criminal proceedings, disciplinary proceedings are instituted against the offender which can result in various sanctions. If the offender is given a prison sentence of one year or more at the end of the criminal proceedings, he even has to leave the public service.

Re. article 5

56. German law meets the requirement contained in article 5 (1) (a) to prosecute all acts of torture which were committed in its own territory or on board a ship or aircraft. In accordance with sections 3 and 4 of the Penal Code, German criminal law applies to all acts committed within Germany (within the territory of the Federal Republic of Germany) or on ships or aircraft authorized to fly the Federal German flag or to display the national insignia of the Federal Republic of Germany. The requirements contained in item (b) (German offender abroad) are met by section 5, item 12 of the Penal Code. It provides that German criminal law is applicable - regardless of the law of the place of commission - to offences committed abroad when the offences were committed by a German public official or person specially obligated for a public function during or in connection with his duties. Finally, section 7 of the Penal Code complies with the requirements contained in item (c) (German victim of an offence committed abroad). Under paragraph 1 of this provision, German criminal law is applicable to offences committed abroad against a German if such conduct is punishable by the law of the place where it occurred, or if no criminal law enforcement existed at the place where the crime was committed. Cases relating to the aspects dealt with in article 5 (1) have not yet arisen.

57. The requirement in article 5 (2) to punish any person suspected of committing an act of torture in the Federal Republic if the offence was not committed on German territory or on board a German ship or aircraft is met by German law under section 6, item 9 of the Penal Code which provides that regardless of the law of the place of commission, German criminal law is applicable to offences committed outside of Germany if such offences are made punishable by the terms of an international treaty binding on the Federal Republic of Germany. There have not yet been any cases in practice with regard to article 5 (2) of the Convention.

58. Under section 7 (2), item 2 of the Penal Code, German criminal law is applicable to foreigners living in Germany for an act punishable by the law of the place where it occurred if the offender was not extradited either because a request for extradition was never made, or was refused, or because extradition is not feasible "although the Extradition Act (Auslieferungsgesetz) would permit extradition for the type of offence involved".

59. The provisions referred to above are included in the annex 1/ under Nos. 5-9.

Re. article 6

60. Under German law, preliminary detention can be ordered in accordance with section 112 of the Code of Criminal Procedure if there is danger that the accused will flee, provided that he is strongly suspected of the act and the measure is not disproportionate to the significance of the case or to the punishment likely to be imposed.

61. The requirement contained in the second clause of the second sentence of article 6 (1) (continuation of custody only "for such time as is necessary to enable any criminal or extradition proceedings to be instituted") is fulfilled under German law by the provisions in the Code of Criminal Procedure which provide for a judicial hearing at any time (section 117 of the Code of Criminal Procedure), and only permit preliminary detention of more than six months under certain circumstances, namely when "the peculiar difficulty or the peculiar extent of the investigations or some other important reason stand in the way of imposition of judgement and justify continued detention."

62. The Federal Republic is a party to the Vienna Convention on Consular Relations of 24 April 1963. Article 36 (1) of this Convention guarantees that the person detained can be granted the assistance referred to in article 6 (3).

63. Article 6 has not yet been applied in any actual case.

64. The wording of the provisions referred to is included in the annex 1/ under Nos. 10-12.

Re. article 7

65. The implementation of the state obligation envisaged in article 7 (1) to institute criminal proceedings against the alleged torturer if he is not to be extradited is covered under German law by the principle of legality (section 152 (2) of the Code of Criminal Procedure). This provision stipulates the following:

> "(1) To prefer the public charge is the function of the prosecution.
>
> (2) Except as otherwise provided by law, it is obliged to take action in case of all acts which are punishable by a court and capable of prosecution, so far as there is a sufficient factual basis."

66. Section 160 (1) of the Code of Criminal Procedure prescribes:

> "As soon as the prosecution learns of a suspected punishable act through a report or in some other manner, it shall explore the factual situation in order to make a decision as to whether a public charge shall be preferred."

Exceptionally, the prosecution is, however, permitted to use its discretion in deciding whether to prosecute a criminal offence. In such a case, the principle of discretionary prosecution applies rather than that of legality. In accordance with section 153c (1) of the Code of Criminal Procedure it can

refrain from prosecuting a criminal offence in certain cases precisely defined by the statute if when making the decision other interests are found to outweigh the public interest in prosecution:

"(1) The prosecution can refrain from prosecuting a criminal offence:

1. which has been committed outside the territorial application of this statute or which has been committed by a participant in a criminal offence in this territory which was perpetrated outside the territorial application of this statute,

2. which a foreigner has committed within Germany on a foreign ship or aircraft,

3. if a punishment has already been executed abroad against the accused for the offence and if the punishment to be expected in Germany would be negligible after credit is given for the punishment imposed abroad or if the accused has been finally and conclusively acquitted outside Germany for the offence."

67. The precept of equal treatment embodied in the Constitution (art. 3 (1) of the Basic Law: "All persons shall be equal before the law") as well as the principle of due course of law, which is also contained in the Constitution (art. 20 (3) of the Basic Law: "Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice.") guarantee that the obligations contained in article 7 (2) and (3) are met (application of equal standards of evidence and the conduct of a fair trial).

Re. article 8

68. The Federal Republic of Germany is among those States which do not make extradition conditional on the existence of a treaty. In this connection, it observes the provisions contained in paragraphs 3 and 4 of article 8.

Re. article 9

69. The Federal Republic meets the obligation arising from this provision of the Convention to afford other States parties the "greatest measure of assistance" in conformity with existing treaties on mutual judicial assistance.

Re. article 10

70. In Germany, trainees for the professions concerned receive instruction regarding the prohibition against torture.

71. As was already pointed out in paragraphs 7 to 12 above, the competence for the functions of the State in Germany is distributed between the Federation and the Länder by way of provisions contained in the Basic Law. Accordingly, the arrangement concerning the training of the groups affected by the instruction within the meaning of article 10 of the Convention is partly the responsibility of the Federation and partly that of the Länder.

72. For instance, national defence is the responsibility of the Federation as is, consequently, the instruction of the "military personnel" referred to in paragraph 1. Section 33 (2) of the Military Personnel Act provides that military personnel must be informed both of their civil duties and rights and of those under international law in war and peace. The relevant provisions are contained in the annex 1/ under No. 13.

73. The ordinance of 16 October 1985 regarding the training and examination for the nursing profession which stipulates that the instruction of prospective nurses include "ethics", as well as criminal and civil provisions of importance to their profession, is also subject to federal law. The instruction to be given to members of the "medical personnel" referred to in article 10 (1) also includes information concerning the "legal position of the patient or those having care and custody of him".

74. The administration of justice, and thus prisons, is the responsibility of the Länder. Consequently, the training of personnel for the prison service, which is incumbent on the Länder, is regulated by Land law. Generally, this is done through statutory rules and orders in which it is prescribed that applicants for the prison service must have a suitable character and that their training must include basic knowledge in the fundamental legal principles of imprisonment.

75. In this connection, special mention should be made of the situation in the five new German Länder where the treatment of prisoners in accordance with constitutional norms was not guaranteed before accession. Particular attention is, therefore, paid to the instruction of prison officers. Land Thuringia can serve as an illustration of the situaton in that part of Germany. Prison officers already employed inthe Land prison service are given basic knowledge of the legal foundations of imprisonment and of how to treat people within the framework of further training measures in the Land training centre for prison officers. Furthermore, the Ministry of Justice, Federal and European Affairs is drawing up training and examination regulations for officers in the general prison service which correspond in content to the regulations in the old Länder.

76. The German legal system also fulfils the requirements of article 10 (2) of the Convention. The prohibition against torture is afforded by provisions which feature prominently in the German Constitution, namely by article 1 (1) of the Basic Law, i.e. the opening sentence of the Constitution, in the form of the obligation of "all State authority", binding as directly enforceable law, to respect and protect the dignity of man, as well as by the second sentence of article 104 (1) of the Basic Law which stipulates that detained persons may not be subjected to mental or to physical ill-treatment. These provisions contained in the Constitution of relevance to law enforcement are "fully valid components" of the training undertaken by personnel employed in prisons. This ensures that the content of the prohibition against torture is imparted during training. It is therefore unnecessary that the prohibition against torture and other cruel, inhuman or degrading treatment be cited once more in the relevant training regulations.

Re. article 11

77. Section 136a of the Code of Criminal Procedure, which as already been referred to in connection with article 2, applies to the interrogation of the accused. Experience in the Federal Republic of Germany suggests that this provision is sufficient to prevent acts of torture and other "forms of cruel, inhuman or degrading treatment or punishment" included in article 11 in accordance with the second sentence of article 16 (1) during interrogation, as the small number of convictions for assault and battery in office and extraction of testimony by duress shows. The Federal Government is observing this field. If, as a result of particular events, it turns out that the protection afforded by Section 136a of the Code of Criminal Procedure is not sufficient, the Federal Government will examine article 11 accordingly to establish what additional legislation must be enacted in order to ensure that the treatment of persons interrogated meets the requirement of the Convention.

78. As far as detained persons are concerned, a "regular systematic" review of prison and accommodation conditions is carried out. It is mainly through the provisions contained in the administrative regulations concerning section 151 of the Execution of Sentences Act, which apply throughout the Federal Republic, that German law ensures the proper treatment of those concerned and their protection from possible attacks and ill-treatment. It prescribes that penal institutions must be visited at least twice a year by the regulatory authority and that they must be "inspected thoroughly" at least once a year. The official in charge must visit the prisoners and satisfy himself that they are being treated properly.

79. Land law provides for visits to the closed wards of psychiatric hospitals for monitoring purposes. Moreover, it is also prescribed that some parliamentary committees, expecially the Petitions and the Legal Committees, visit penal institutions. Furthermore, there is monitoring at the international level. The committee formed under the European Convention for Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987 visits places where people are detained. It organizes regular visits and visits for special purposes.

80. Thus, a systematic review as to whether the existing "rules, instructions, methods and practices" are sufficient to "prevent any cases of torture" is guaranteed.

Re. article 12

81. An impartial investigation as defined in this article is guaranteed in Germany. In accordance with section 152 (2) of the Code of Criminal Procedure, already referred to in connection with article 7, the prosection is obliged to take action where a criminal offence is suspected. Section 160 (1) of the Code of Criminal Procedure, which was also referred to in the context of article 7, is an additional provision which obliges the prosecution to initiate an investigaiton if it suspects that a criminal offence has been committed.

82. This means that the prosecution must, for example, question witnesses, request information from authorities, apply for a judicial act of investigation or interrogate the accused in order to be able to decide whether to prefer charges. If these steps are not taken, even though the legal prerequisites exist, the prosecutor concerned may be charged with obstructing criminal execution in office (section 258a of the Penal Code). The wording is contained in the annex 1/ under No. 14.

Re. article 13

83. German law complies with the requirements of article 13 of the Convention. The right to have a charge of torture or cruel, inhuman or degrading treatment examined is a basic right guaranteed by article 19 (4) of the Basic Law (cf. paras. 7-12). National law provides for a series of legal remedies which, depending on the circumstances of each case, can be used accordingly. It is possible to report the offence. If the prosecution does not prefer the public charge its decision can be contested (section 172 of the Code of Criminal Procedure, wording in the annex 1/ under No. 16). With the assistance of the court, the injured party can thus compel the prosecution to prefer charges. Finally, those concerned can turn to the Federal Constitutional Court, the European Commission for Human Rights or, by way of a petition, the Bundestag or the Länder parliaments. Although an appeal to the Federal Constitutional Court and a petition in accordance with article 25 of the European Convention on Human Rights are in principle only admissible after all domestic remedies have been exhausted, the complainant can, with the help of the remedies mentioned, cause legal proceedings to be accelerated appropriately so that the "prompt examination" within the meaning of article 13 is ensured. In accordance with the decisions made by the Federal Constitutional Court, appropriately accelerated legal proceedings are a constitutional requirement based on the principle of due course of law. The first sentence of article 6 (1) of the European Convention on Human Rights, moreover, prescribes that legal proceedings must take place "within a reasonable time".

84. In addition, attention should be drawn to the legal remedies under the Execution of Sentences Act available to prisoners who wish to lodge a complaint on the way they have been treated in prison. They include complaints to the prison governor or the regulatory authority (section 108 (1) and (2) of the Execution of Sentences Act) and the general complaint about the conduct of a prison officer (section 108 (3) of the Execution of Sentences Act, wording contained in the annex 1/ under No. 17). Finally, with regard to all measures concerning imprisonment, it is possible to apply for a ruling by an independent court. (section 109 ff. of the Execution of Sentences Act, cf. No. 18 in the annex 1/).

85. A person remanded in custody can, in principle, appeal against orders from the committing magistrate by filing a complaint (section 304 of the Code of Criminal Procedure, wording of cf. No. 19 in the annex 1/; exceptions para. 4, sentence 2 and para. 5). In so far as it concerns measures taken by the prison governor within the competence of the committing magistrate, this remedy may be resorted to; otherwise, remonstration and a complaint about the conduct of a prison officer are possible. In addition, an application

can be made for a judicial decision in accordance with section 23 ff. of the introductory act to the Constitution of Courts Act (Gerichtsverfassungsgesetz) (wording cf. No. 20 in the annex 1/).

86. The relevant provisions of the Penal Code (e.g. the punitive sanction for bodily harm or coercion) guarantee the protection of prisoners, witnesses, etc. who have filed a complaint on the grounds of ill-treatment and intimidation stipulated in article 13 (2) of the Convention.

Re. article 14

87. German law goes beyond the requirements of the Convention by granting damages for every form of unlawful and culpable breach of official duty (art. 34 of the Basic Law and section 839 of the Civil Code, wording contained in the annex 1/ under No. 21). Where a public official, or another person employed in the public service, unlawfully and culpably violates his official duties (this is undoubtedly the case when an act of torture has been committed), liability to pay the injured party full compensation shall rest in principle on the public body which employs him, normally the State (Federation or Land) or the local authorities. In so far as the "fair and adequate" compensaton provided for in sentence 1 includes compensation for non-pecuniary damage (compensation for pain and suffering), this is covered by section 847 of the Civil Code (wording in the annex 1/ under No. 22).

88. The right of dependents to compensation in the event of the death of the victim as a result of an act of torture is guaranteed by sections 844 and 845 of the Civil Code (contained in the annex 1/ under Nos. 23 and 24).

Re. article 15

89. Section 136a (3) of the Code of Criminal Procedure meets the obligation contained in article 15 to ensure that any statement made as a result of torture is not used as evidence; in this respect, reference is made to the observations regarding article 11 of the Convention. The use of this information is completely prohibited. If the accused asserts convincingly that his confession was extorted by the police or the prosecution through torture or other prohibited methods of interrogation, the judge must, ex officio, investigate the matter. The use of a statement which was obtained in violation of this prohibition renders the conviction subject to appeal.

90. The prohibition against using this evidence does not protect public officials who have employed the prohibited interrogation methods listed in section 136a of the Code of Criminal Procedure from prosecution for extraction of testimony by duress under section 343 of the Penal Code.

Re. article 16

91. The obligations contained in the first sentence of article 16 (1) of the Convention are met in German law by the duty contained in the second sentence of article 1 (1) of the Basic Law for "all State authority" to protect the dignity of man, as well as by the prohibition embodied in the second sentence of article 104 (1) of the Basic Law against subjecting detained persons to

mental or to physical ill-treatment. In addition, the relevant penal provisions, e.g. assault and battery in office, dangerous and grievious bodily harm (cf. comments on art. 2), go beyond the punitive sanction only for torture as it is defined in article 1 of the Convention. To a considerable degree, they prevent cruel, inhuman or degrading acts which do not quite constitute torture. In all other respects, the prevention of and disciplinary action taken against "cruel", "inhuman" or "degrading" acts by public authorities is the task of their supervisory body.

92. German law complies with the requirement resulting from the second sentence of article 16 (1) that the cruel, inhuman or degrading treatment or punishment referred to in articles 10, 11, 12 and 13 of the Convention be regarded as torture. In this respect, reference is made to the observations on those articles.

III. THE TREATMENT OF PRISONERS ASSOCIATED WITH TERRORISM

93. Persons remanded in custody on charges of terrorism and convicted terrorists are in principle treated like other prisoners in Germany in custody and penal confinement. In so far as stricter security measures are taken than for other prisoners, this results from the fact that prisoners associated with terrorism frequently attempt to carry on their active involvement in the terrorist organization of which they are a member.

94. Since the mid-1970s, the Federal Republic of Germany has been repeatedly accused of subjecting prisoners associated with terrorism to "solitary confinement" or "isolation torture". These accusations have already been discussed several times in the Human Rights Committee set up under the International Convenant on Civil and Political Rights. The members of the Committee questioned the German representatives after the submission of the three State reports in accordance with article 40 of the Covenant, namely in 1978, 1986 and 1990. The Federal Government takes these accusations seriously and is investigating them very thoroughly in collaboration with the Länder which are responsible for conditions in prisons. Repeated reviews have shown all accusations to be unjustified.

95. In the Federal Republic of Germany, decisions regarding necessary security measures, including for prisoners associated with terrorism, are made by the competent prison authorities or courts of the Länder which take into consideration the circumstances in each individual case. Only a few extremely dangerous prisoners are in high security sections of the prison and only a few are separated from other prisoners on the grounds of special orders.

96. Where a prisoner is separated from other prisoners, this is compensated for by allowing him more visits and, in the case of prisoners associated with terrorism living in groups, by better accommodation. They are frequently treated generously with regard to visits from their families and from others. Many of these prisoners are allowed to receive visits lasting twice as long as those for other prisoners. Moreover, radio, television, newspapers, magazines and an extremely large volume of correspondence provide these prisoners with further diverse forms of contact with the outside world.

97. Provided there are no special orders concerning their separation from other prisoners, they also have an opportunity to come into contact with other prisoners during the daily free hour, prison work and during leisure activities.

98. Moreover, some of the prisoners convicted for terrorist activities are already in open prisons, are allowed to leave the prison for a certain length of time, are undergoing vocational training or have successfully completed training.

Note

1/ The annexes, when received from the Government of the Federal Republic of Germany, can be consulted in the files of the Centre for Human Rights.